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THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:

RAYMOND ZAPPE : July 21, 2004

Serial No. 10/077,346 : Group Art Unit 3612

Filed: 02/14/02 : Examiner: HILARY L. GUTMAN

For: LINER APPARATUS AND METHOD OF MAKING A LINER

SECOND REVISED SUPPLEMENTAL BRIEF FOR APPELLANT

Hon. Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

Sir:

This Brief is filed in response to the second Notification of Non-Compliance dated 06/17/2004.

It is believed that the Brief now fully complies with the requirements of 37 C.F.R. 1.192(c)

Respectfully submitted
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TABLE OF CONTENTS

	<u>Page</u>
REAL PARTY IN INTEREST	2
RELATED APPEALS AND INTERFERENCES	2
STATUS OF CLAIMS	2
STATUS OF AMENDMENTS	3
SUMMARY OF THE INVENTION	4
ISSUES	5
GROUPING OF CLAIMS FOR EACH GROUND OF REJECTION	5
ARGUMENTS	6
CONCLUSION	12
APPENDIX	13

REAL PARTY IN INTEREST

Applicant is the real party in interest.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences. However, this Supplemental Brief is filed upon the reinstatement of the original appeal. Prosecution was reopened following the filing of the Appeal Brief.

STATUS OF CLAIMS

Claims 21 - 27 are the only claims remaining in this application, and accordingly are the only claims under consideration in this appeal.

Original claims 1 - 20 were method claims and were originally withdrawn from consideration by way of an election without traverse following a restriction requirement. Those claims have been canceled from this application and have been included in a divisional application filed since this appeal was filed.

Claim 21 is an independent claim and claims 22 - 27 are dependent claims. All of the seven claims under consideration have been finally rejected.

STATUS OF AMENDMENTS

An Amendment A was filed, amending independent claim 21 and making some corrections to the specification.

An Amendment B was filed subsequent to the original Final Rejection. The purpose of the Amendment B was to rewrite the Abstract of The Disclosure in response to the Examiner's objection to certain terminology. No claims were amended. It is believed that Amendment B was entered, although there is a question about the receipt of the Amendment. The Amendment was faxed and has been refaxed with appropriate documents.

Amendment C was filed after prosecution was reopened by the Examiner. Three paragraphs were amended in Amendment C. No claims were amended. Amendment C was entered. The purpose of Amendment C was to correct informalities noted by the Examiner and to hopefully clarify the "relatively flexible" and "relatively inflexible" terms objected to by the Examiner.

Amendment D, canceling claims 1 - 20, was faxed to the Examiner and presumably has been entered. A divisional application has been filed, and the canceled claims 1 - 20 are now found in the divisional application.

SUMMARY OF THE INVENTION

The present invention comprises a three or four layered bed liner for a truck. This is best shown in Fig. 4, but may also be understood from the method steps illustrated in Figs. 1, 2, and 3. The bed liner includes a base coat 80, a patterned coat 82 disposed on and secured to the base coat 80, and a clear top coat 84 disposed on and secured to the patterned coat 82. The clear top coat 84 allows the patterned coat 82 to be viewed. The base coat may be a foam backing coat, as shown in Fig. 3. A fourth clear layer may be added if desired. The fourth clear layer is illustrated in Fig. 2.

Methods of making the liner, illustrated in Figs. 1, 2, and 3, and as defined in claims 1 - 20, are not under consideration in this Appeal, as indicated previously in the Status of the Claims portion of this Brief.

ISSUES

The following issues are presented in this Appeal:

1. Whether claims 25 -26 are indefinite under 35 U.S.C. § 112, second paragraph, due to the inclusion of the terms “relatively flexible” and “relatively inflexible.”
2. Whether claims 21 - 22 and 25 - 26 are patentable over U.S. Patent 6,103,390 (Kamiya et al), hereinafter Kamiya ‘390, under 35 U.S.C. § 102(b).
3. Whether claims 23 - 24 are patentable over Kamiya ‘390 in view of U.S. Patent 4,098,184 (Okada et al), hereinafter Okada ‘184 under 35 U.S.C. § 103(a).
4. Whether claim 27 is patentable over Kamiya ‘390 in view of Kamiya ‘390 in view U.S. Patent 6,350,509 (Sada et al), hereinafter Sada ‘509 under 35 U.S.C. 103(a).

GROUPING OF CLAIMS FOR EACH GROUND OF REJECTION

- (a) Claims 25 - 26: Rejected under 35 U.S.C. § 112. These claims stand together with respect to this specific rejection.
- (b) Claims 21, 22, 25, 26: Rejected under 35 U.S.C. § 102(b) over Kamiya ‘390. Claim 21 is an independent claim, and it follows that if claim 21 is deemed allowable, the dependent claims 22 - 27 are also allowable. Dependent claim 22 has a limitation unrelated or independent of the limitations of dependent claims 25 and 26. Claims 25 and 26 have limitations which are essentially opposite to each other.

- (c) Claims 23 and 24: Rejected under 35 U.S.C. §103(a) over Kamiya ‘390 in view of Okada ‘184. These claims stand or fall together.
- (d) Claim 27: Rejected under 35 U.S.C. §103(a) over Kamiya ‘390 in view of Sada ‘509.

ARGUMENTS

(a)

The crux of the issue under 35 U.S.C. §112 is whether the terms “relatively flexible” and “relatively inflexible” are indefinite or, when taken in the context in which they are used, are definite and accordingly appropriate. According to the MPEP, the acceptability of the claim language depends on whether one of ordinary skill in the art would understand what is claimed in light of the specification. In other words, whether one of ordinary skill in the art would be apprized of the scope of the claim. MPEP §2173.05(b).

Paragraph 0049 was amended in Amendment C to clarify the language of claims 25 and 26. The language of paragraph 0049 states that the various coats may flex easily or they may not flex easily. It is respectfully submitted that a person of ordinary skill in bed liners would be able to understand the terms without any problem or question. Accordingly, it is respectfully submitted that the 23 U.S.C. §112 rejection is not well taken and should be withdrawn.

(b)

The prior art rejection is based primarily on the Kamiya ‘390 patent. The Kamiya ‘390 patent is for a multilayer medallion or decorative article. It has nothing to do with the subject matter of the present application. In the first place, would a person of ordinary skill in the bed liner art look to a medallion for ideas about bed liner elements? The answer is a resounding “NO.”

In the second place, independent claim 21 calls for three layers of materials, a base layer, a patterned layer on the base layer, and a clear layer through which the patterned layer may be observed. Kamiya ‘390 does not have those three layers arranged in the same manner as specified in claim 21.

The Kamiya ‘390 patent comprises a three inch by two inch medallion or decorative article for a vehicle. The Kamiya ‘390 structure includes a bottom release layer 8 and a double sided adhesive layer 5A secured to the release layer. Then there is a base layer 4 secured to the double sided adhesive layer 5A. On top of the release layer is a bottom adhesive coating 5, a protective coating 6, a glossy metal thin film layer 3, a resin film 2, a color coating 9 on the glossy metal thin film layer, and a clear coating 10 on the glossy thin film layer 3 and the color coating 9.

Under 32 U.S.C. §102(b), every element of the claimed invention must be identically shown in a single reference, and these elements must be arranged as in the claim under review. In re Bond, 910 F.2d 831, 15 U.S.P.Q.2d 1566 (Fed. Cir. 1990). Does the

medallion of the Kamiya '390 patent have the same structure as in independent claim 21?

Again, a resounding "NO."

The structure of Kamiya '390 does not include the elements of claim 21 arranged in the same structural manner. The medallion has a total of nine layers, including a color coating 9 which is discontinuous and is not a separate layer, but is merely a part of a layer. The Kamiya '390 structure is not a proper reference against the structure defined in claim 21 under 35 U.S.C. § 102(b).

The last statement in the next preceding paragraph ignores the fact that there is a world of difference between a medallion and a bed liner. When one takes into consideration the art of truck bed liners, Kamiya '390 is even farther afield.

If one ignores the fact of the nine layers in the Kamiya '390 structure, one still may not read the Kamiya '390 structure on the three layers of claim 21. Claim 21 specifies a first base layer, a patterned second layer on the base layer, and a clear third layer on the patterned layer. Kamiya '390 does not have those three layers arranged in that manner!

To read Kamiya '390 on claim 21 one would have to say that layers 8, 5A, 4, 5, and 6 were the equivalent of the base layer of claim 21. Then one would have to say that layers 3, 2, and 9 were the equivalent of the patterned layer of claim 21. Finally, one would have to say that the clear coating 10 was the equivalent of the clear coating of claim 21. The problem with the clear coating 10 of Kamiya '390 is that claim 21 specifies that the top clear layer is on the patterned second layer, while the Kamiya '390 clear coating 10 is on both the

color coating 9 and the resin film layer 2. Again, under 35 U.S.C. §102(b) the Kamiya ‘390 structure fails.

With respect to the rejection of claim 22, the Examiner contends that “an elastic sheet such as polyurethane resin” may be considered as foam. This contention is respectfully traversed. The terms “foam” and “elastic resin sheet such as polyurethane resin” are not synonymous. However, again, with claim 21 allowable, claim 22 is also allowable.

(c)

The above discussion of the Kamiya ‘390 patent should put an end to the present issue because claims 22 - 27 are all dependent from claim 21. Accordingly, it follows that if claim 21 is allowable, claims 22 - 27 are also allowable. However, claims 23 and 24 include specific limitations to the patterned layer.

The Okada ‘184 patent has been combined with the Kamiya ‘390 patent for the rejection of claims 23 and 24. Claims 23 and 24 add to claim 21 the limitations of a polychromatic and monochromatic layer, respectively.

Okada’184 deals with printing on a curved surface. An image to be transferred is placed on a flexible carrier 7 and secured to a frame 8. The image is transferred to the carrier 7 from a screen 10. The frame 8 is then placed beneath a body 1. The body 1 includes an air tight chamber 2 and the chamber 2 has a flexible membrane 3 disposed above

the frame 8 and the flexible carrier 7. Pressure is added into the chamber 2 to move the membrane 3 downwards onto the carrier 7 to transfer the image to a desired object 15.

The Okada '184 patent has absolutely NOTHING to do with the structure recited in claims 23 and 24. Claim 23 adds the limitation of a polychromatic patterned layer, and claim 24 adds the limitation of a monochromatic patterned layer. Okada '184 discloses a flexible printing transfer element, which has nothing to do with the patterned layer of the present invention. The Okada '184 patent is completely inapposite to both the present invention and to the Kamiya '390 structure. There is certainly no basis for combining Okada the '184 and the Kamiya '390 patents! Moreover, there is no mention of polychromatic or monochromatic patterned layers in either of the applied patents. It follows that claims 23 and 24 are independently allowable.

(d)

The Sada '509 patent is similarly inapposite to the present invention and to Kamiya '390. Sada '509 concerns the painting of cars with different types of paint to provide different hues which vary according to the viewing angle. That is, multiple layers of paint are sprayed on a vehicle to produce different hues when the vehicle is viewed from different angles. Such art has nothing to do with claim 27, which adds to claim 21 the limitation of a fourth clear layer. Moreover, and once again, the combination of Sada '509 to the Kamiya

‘390 patent is clearly improper, aside from the fact the neither of them even suggest in any way that a bed liner may include the limitations found in claims 21 and 27.

(General)

The criterion of section 103 is not whether the differences from the prior art are simple enhancements, but whether it would have been obvious to make the claimed structure. Continental Can Company U.S.A., Inc. v. Monsanto Co., 948 F.2d 1264, 20 U.S.P.Q.2d 1746 (Fed. Cir. 1991).

The Examiner bears the burden of showing that the prior art provides some teaching, suggestion, or motivation to make the particular combination or rearrangement of parts. See In Re Raynes, 7 F.2d 1037, 28 U.S.P.Q.2d 1630 (Fed. Cir. 1993). This the Examiner has failed to do with respect to the cited art.

Nothing in Kamiya ‘390 by itself, or in combination with the other two patents combined by the Examiner, either teaches or suggests the simple elements set forth in independent claim 21 and dependent claims 22 - 27. This is so even if one ignores the fact that the combinations are improper in the first place.

Finally, the Examiner has ignored the preamble limitation of “A bed liner for a vehicle.” While such a preamble states the intended purpose for the claimed article, the intended use also structurally differentiates the claimed article from the cited art. In other words, the medallion or ornamental article of Kamiya ‘390 could not be used for a vehicle’s

bed liner. Structurally, there is a vast difference between a bed liner for a vehicle and an ornamental article or medallion. Accordingly, the Examiner is in error in completely disregarding the preamble. See MPEP §2111.02, and cases cited. Again - the claims under consideration define over the cited art and are patentable.

CONCLUSION

For the reasons given above, it is respectfully submitted that the present claims under consideration, namely claims 21 - 27, define over the prior art and are nonobvious. It follows, with all of the claims remaining in the application being allowable, that the application is now in condition for allowance.

Respectfully submitted,

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APPENDIX

The following claims 21 - 27 are involved in this appeal:

21. A bed liner for a vehicle comprising in combination:

a first base layer;

a patterned second layer secured to the first base layer; and

a clear third layer secured to the patterned layer for permitting the patterned layer to be viewed.

22. The liner of claim 21 in which the base layer is a foam layer.

23. The liner of claim 21 in which the patterned layer is polychromatic.

24. The liner of claim 21 in which the patterned layer is monochromatic.

25. The liner of claim 21 in which the liner is relatively flexible.

26. The liner of claim 21 in which the liner is relatively inflexible.

27. The liner of claim 21 which includes a clear fourth layer on the clear third layer.